Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1977

No. 77 - 5

SALLY MAIETTE and ALLEN N. BRUNWASSER,

Petitioners

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 77-1160

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IN THE SUPREME COURT
OF THE UNITED STATES

SALLY MAIETTE and ALLEN N. BRUNWASSER,
Petitioners

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 77-1160

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Sally Maiette and Allen N. Brunwasser pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The May 5, 1977 order of the Third Circuit Court of Appeals dismissing the appeal as moot is unreported. It is reproduced and marked Exhibit A.

The June 2, 1977 order of the United States Court of Appeals for the Third Circuit which denied reargument and reargument en banc is unreported. It is marked Exhibit B.

JURISDICTION

Sally Maiette was indicted for 18 U.S.C. 1623 perjury. Her counsel, Allen N. Brunwasser, Esquire, entered his appearance in the case.

The order is appealable. *Appeal of Curran,* 3 Cir., 1976, 536 F.2d 1009, 1011; *U.S. v. Bernstein,* 1976, 2 Cir., 533 F.2d 775, 787 (removed counsel can represent defendant on appeal).

The jurisdiction of the United States Supreme Court is invoked under authority of 28 U.S.C. 1254(1).

QUESTION PRESENTED FOR REVIEW

When an issue on appeal is "capable of repetition, yet evading review" should it be dismissed as moot without at least resolving the pre-appeal case posture in the District Court?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Fifth Amendment to the United States Constitution)

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense." (Sixth Amendment to the United States Constitution)

"Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant." (ABA Code of Professional Responsibility, EC 5-14)

"If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients." (ABA Code of Professional Responsibility EC 5-15)

"In those instances in which a lawyer is justified in representing two or more clients having differing inter-

ests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multpile clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances." (ABA Code of Professional Responsibility EC 5-16)

"A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client." (ABA Code of Professional Responsibility EC 5-19)

STATEMENT OF THE CASE

A. Course of Proceeding Below and Disposition in the Court Below

On June 16, 1976, Sally Maiette (Defendant) was indicted on two counts of 18 U.S.C. 1623[1] grand jury perjury (docket entry 1).

[1] "1623. *False declarations before grand jury or court*

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section as applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section. In any prosecution under this section, the falsity of a declaration set forth in

Through Allen N. Brunwasser, Esquire (Brunwasser), she filed a pre-arraignment request for local rule 24 discovery (docket entry 4).

The United States Attorney filed a July 6, 1976 pre-arraignment motion to disqualify Brunwasser (docket entry 7) because of alleged conflicting representation of George Lee.

After July 12 ,1976 arraignment (docket entry 8), the United States District Court for the Western District of Pennsylvania (Barron P. McCune, District Judge) heard argument on the motion to disqualify (docket entry 9) and on July 21, 1976 denied it (docket entry 12, A-4).

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the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Pre-trial motions were filed July 28, 1976 (docket entry 13) and August 3, 1976 (docket entry 15) and argued August 24, 1976 (docket entry 16).

The prosecutor then filed a superseding three count 18 U.S.C. 1623 [1] grand jury indictment (docket entry 18) making it necessary defendant be processed all over again (docket entry 20).

On September 3, 1976, the original indictment was dismissed (docket entry 22) and pre-trial attack leveled against the new one (docket entry 23-26).

On September 28, 1976, Judge McCune set the motion for oral argument (docket entry 27) and the prosecutor again moved for Brunwasser's disqualification [2] (docket entry 29, A-1).

After a November 4, 1976 argument (docket entry 30), Brunwasser was removed (docket entry 31) on December 9, 1976 (A-12) as counsel for Maiette.

Defendants' December 15, 1976 request Judge McCune recuse (docket entry 32) remains unacted upon because on January 4, 1977 Judge McCune was of the belief that Brunwasser, removed counsel, had participated in the motion's preparation (docket entry 33).

On January [illegible]77 (docket entry 34), a notice of appeal was filed by [illegible]nwasser and defendant in regard

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[2] The United States Supreme Court is respectfully requested to observe removal for Salley Maiette was not requested and, therefore, the District Court acted sua sponte and without a formal written motion. Removal was requested in regard to representation of a witness, Raffaelina Salvati.

to the former's disqualification and by Maiette from the refusal of the District Court to act on her motion for disqualification.

This would be in the nature of mandamus as defendant was reluctant to hire an attorney to actually mandamus a Federal Judge assuming she could find one to do this for her.

On February 24, 1977, George Lee was murdered. This item received widespread attention in the media and was known to the Office of the United States Attorney.

However, no motion of any type was filed and Maiette and Brunwasser continued on with the preparation of their brief and appendix which was served and filed March 16, 1977.

On April 17, 1977, the United States Attorney filed a motion to dismiss the appeal as moot. This document has been reproduced and is marked Exhibit C.

Maiette and Brunwasser answered. This document has been marked Exihibit D.

The United States Attorney sent on an April 14, 1977 communication marked Exhibit E and Brunwasser and Maiette responded with their communication marked Exhibit F.

Without oral argument and on May 5, 1977, the Court of Appeals acting through Circuit Judges Aldisert and Adams dismissed the case as moot. This document has already been marked Exhibit A.

Brunwasser and Maiette filed a timely motion for reargument and reargument en banc which was denied June 2, 1977 and is marked Exhibit B.

B. Statement of the Facts Relevant to the Issues Presented for Review, With Appropriate References to the Record

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On December 8, 1976, the United States District Court for the Western District of Pennsylvania, Barron P. McCune, D.J., removed Allen N. Brunwasser, Esquire (Brunwasser), as counsel for Sally Maiette (Maiette) in *U.S. v. Maiette,* Criminal No. 76-132 (docket entry 31, A-5 through A-12).

The order was, in effect, sua sponte because a previous prosecutor motion presented July 6, 1976 (docket entry 7) had already been denied (docket entry 12, A-4) and nothing new had been filed.

The District Court had already removed Brunwasser as counsel for Raffaelina Salvati because the prosecutor said (A-1 through A-3) there was a conflict between Salvati and Maiette.

> "It is the opinion of the undersigned that the testimony of Salvata will tend to aid in the conviction of the defendant Maiette." (Petition, paragraph 5, A-2)

In the period between the July 21, 1976 first denial (A-4) and the second sua sponte removal (A-12), Brunwasser had performed eight months of substantial services in Maiette's defense in reliance that the alleged conflict problem had been finally adjudicated by the District Court (docket entries 13-26).

Taking the position that she had waived any alleged conflict (A-4) (t. 60-65), and that the removal order was

sanction for her refusal to "cooperate" with the prosecution (see unacted upon petition, A-37, to recuse Judge McCune A-13 to A-37), Maiette appealed to the Honorable Court (docket entry 34) and filed her brief and appendix at Appeal No. 77-1160.

Believing his right to practice law had been improperly restricted in violation of 5th Amendment due process, Brunwasser also (see Court of Appeals Brief, page 27) appealed and filed his brief and appendix at Appeal No. 77-1160.

He argued the impact of Judge McCune's order would bar an attorney from representing all clients, new or old, if an old client became the subject of grand jury interest (see Court of Appeals Brief, pp. 13-15, 23).

On February 14, 1977, George Lee was murdered. The prosecutor and everyone else knew it. On March 16, 1977, Appellants filed and served their brief and appendix.

On April 17, 1977, after his obligation to file a brief had expired, the prosecutor moved to dismiss the appeal as moot.

The December 8, 1976 "Memorandum" of the lower Court did not restrict Brunwasser's removal to the criminal case alone and directed (A-5):

> "For the following reasons we grant the Government's motion for disqualification and therefore remove Allen N. Brunwasser, Esq., as counsel for the defendant in future grand jury *and court proceedings.*" (Emphasis supplied.)

The District Court apparently meant what it said according to its January 4, 1977 (A-37) refusal to act on Maiette's petition to recuse (A-13 through A-36).

The prosecutor's mootness motion did not request the pre-removal status quo be restored or retreat from its former District Court posture when it asserted:

> "4. This motion to dismiss the appeal on the grounds that it is moot does not waive the right of the United States to come into the United States District Court for Western Pennsylvania and relitigate the issue of conflict of interest for reasons other than those presently raised in the hearing before Judge McCune."

Maiette and Brunwasser resisted the motion (Exhibit D) and asked the "capable of repetition, yet evading review" standard be applied. They argued:

1. The prosecutor's failure to move until briefs and records had been filed was an estoppel.

2. The grand jury and I.R.S. civil investigations still continued and the Brunwasser-Maiette problem will rise again.

3. Brunwasser's right to practice law should be adjudicated for the benefit of circuit bench and bar.

The prosecutor then sent an April 14, 1977 letter to the Clerk (Exhibit E) which petitioners answered (Exhibit F).

On May 5, 1977 (Exhibit A), after considering the motion and letters, a two Judge panel of the Honorable Court (Aldisert and Adams, Circuit Judges) dismissed the appeal as moot.

Petitioners' timely motion for reargument and reargument en banc was denied on June 2, 1977 (Exhibit B).

Petitioners now respectfully petition the United States Supreme Court to grant certiorari on this decision and reverse because the controlling United States Supreme Court cases have been, in effect, overruled.

REASONS FOR GRANTING THE WRIT

When an Issue on Appeal Is "Capable of Repetition, Yet Evading Review" Should It Be Dismissed as Moot Without at Least Resolving the Pre-Appeal Case Posture in the District Court?

A. When and if the May 5, 1977 order is docketed in the District Court, Brunwasser will still be removed "as counsel for the defendant in future grand jury *and court proceedings.*" (Emphasis supplied.)

Maiette will still be without her 6th Amendment chosen representative.

The case is ready for and can be immediately listed for trial.

The May 5, 1977 order gives no illumination on how the problem is to be resolved. The prosecutor's motion does not really retreat from its original position (see its paragraph number 4, this petition, page 13).

The District Court's policy is presently unknown. What will Maiette do if the December 8, 1976 order (A-12) is enforced?

The May 5, 1977 Circuit Court order did not revoke or change it nor give the District Court, client or counsel any advice or instruction.

The Court is respectfully requested to take judicial notice that Mr. Orr has now resigned and will be un-

available to give his views. Also, if things take the normal course, the Democratic administration in Washington will soon remove U.S. Attorney Blair A. Griffith, a Republican, and a new prosecutor will appear on scene.

What will be his position in regard to Brunwasser's removal or how the case should proceed?

Petitioners respectfully suggest and urge the Supreme Court of the United States to declare that they should not be relegated to this amorphous and dangerous status.

B. Petitioners also respectfully suggest the issue is not moot but clearly one within the "capable of repetition, yet evading review" decisions of the United States Supreme Court. *Linmark Associates, Inc. v. Township of Willingboro,* decided May 2, 1977, 97 S.Ct. 1614, 1615, fn. 1 (sale sign prohibition mooted by property sale does not end case insofar as involved realtor is concerned because he will want to post signs on other real estate listed with him); *Gilligan v. Morgan,* 1973, 93 S.Ct. 2440, 2443, 413 U.S. 1, 5 (court will not resolve case on mootness even though facts appear to justify it; case decided on merits); *Roe v. Wade,* 1973, 93 S.Ct. 705, 713, 410 U.S. 113, 125; *Pasadena City Board of Education v. Spangler,* 1973, 96 S.Ct. 2693, 2702, —— U.S. —— (U.S. intervenes in school desegregation case, fact original student plaintiff graduates does not moot appeal); *Nebraska Press Association v. Stuart,* 1976, 96 S.Ct. 2791, 2797, —— U.S. —— (court publicity restraining order expires; issue not moot because court can do it again).

C. Brunwasser also respectfully suggests that his due process 5th Amendment right to practice his profes-

sion should not have been restricted and that the bench and bar of the Third Circuit Court of Appeals should be advised concerning the guidelines so that everyone can act accordingly. *Petition of Phillips,* decided June 28, 1976, 241 Pa. Superior Ct. 246, 361 A.2d 325, 328 and fn. 3, citing *Dent v. West Virginia,* 1889, 129 U.S. 114, 9 S.Ct. 231; *Mazzocone v. Willing,* decided November 22, 1976, allocatur granted by the Supreme Court of Pennsylvania on February 15, 1977, —— Pa. Superior Ct. ——, 369 A.2d 829, 831.

D. The United States Supreme Court is respectfully urged to observe that this case does not concern one particular attorney and one particular client. It represents the policy of the local United States Attorney to neutralize lawyers by disqualifying them in every case where the present defendant can be a witness against numerous third parties previously represented by the lawyer or where the lawyer has been an attorney for any other person who might be a witness against his present defendant client either in the grand jury or at trial.

With a limited number of skilled members of the criminal law thus disqualified, it is painfully apparent that lawyers in criminal cases or grand jury proceedings will now be appointed under the Criminal Justice Act and might not offer the vigorous defense of an older, independent lawyer who does not require constant subsidy from government funds and owe his income to the discretion of appointment vested in the local United States Magistrates.

In order to demonstrate the impact on this case alone, petitioners, in the appendix filed in the Court of Appeals,

clearly demonstrated that almost every skilled member of the criminal bar would be removed as potential counsel for Maiette (Exhibit 1-Exhibit 8; A-38 to A-45).

Various lawyers who had represented George Lee, the subject of the alleged conflict of interest in this case, were subpoenaed to the grand jury. This included Paul Love, Esquire, Stanley Kann, Esquire, Carl Janavitz, Esquire, Charles Caputo, Esquire and Donald Hershman, Esquire. Since these lawyers were alleged to have represented Lee, they certainly would be subject to the same rule which removed Brunwasser.

On April 25, 1976, a proceeding was held before United States District Judge Daniel J. Snyder, Jr. concerning bringing lawyers into the grand jury. Representing the previously named defendants were John L. Doherty, Esquire, Harold Gondelman, Esquire, Joseph G. Kanfoush, Esquire, John B. Yoedt, Esquire and Donald S. Hershman, Esquire. Obviously these lawyers are now eliminated under the present decision.

Attorneys Hershman, Gondelman and Kann are members of the prestigious law firm of Baskin, Boreman, Wilner, Sachs, Gondelman & Craig, Esquires. This firm has 38 lawyers, all of whom are now effectively eliminated including Philip Baskin, Esquire, who was subpoenaed to appear in the grand jury to testify against Lee on March 20, 1975.

John L. Doherty is a member of the law firm of DeCello, Bua & Manifesto which firm contains 7 lawyers including Paul A. Love. These lawyers, all skilled in the criminal law, have now been effectively removed.

In fact, Allen N. Brunwasser, Esquire, was also subpoenaed to the grand jury for testimony on April 27, 1976 but was not required to speak.

Evaluation of what has occurred when taken together with a new idea of bringing lawyers into the grand jury in an attempt to coerce them to testify against their clients can certainly lead to the conclusion that the right of a lawyer to practice law and the right of his client to be represented within the free choice area of the 6th Amendment has been seriously attacked and jeopardized.

CONCLUSION

Petitioners respectfully urge the United States Supreme Court to grant certiorari and to reverse the decision of the Court of Appeals for the Third Circuit that the proceeding had become moot just because George Lee unfortunately was murdered before a decision could be made.

Respectfully submitted,
ALLEN N. BRUNWASSER,
Attorney for Petitioners

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-1160

UNITED STATES OF AMERICA

vs.

MAIETTE, SALLY

Allen N. Brunwasser, Esquire and Sally Maiette,
Appellants

(D.C. Crim. No. 76-132)

Present: ALDISERT and ADAMS, Circuit Judges.

1. Appellee's motion to dismiss appeal as moot, in which it states "This Motion To Dismiss the appeal on the grounds that it is moot does not waive the right of the United States to come into the United States District Court for the Western District of Pennsylvania and relitigate the issue of conflict of interest for reasons other than those presently raised in the hearing before Judge McCune.",

2. Appellants' answer to appellee's motion to dismiss appeal,

3. Letter dated April 14, 1977 from counsel for appellee in regard to motion to dismiss and stating "that the government does not intend to file a brief answering Appellant Maiette's position.",

4. Letter dated April 18, 1977 from counsel for appellants in answer to appellee's letter dated April 14, 1977, in the above listed for Monday, May 2, 1977, or as the Court decides.

Respectfully,
(s) T. F. Quinn
Clerk

enc.
fm

The foregoing motion of appellee to dismiss appeal as moot is granted

By the Court,
(s) Aldisert
Judge

Dated: May 5, 1977

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1160

UNITED STATES OF AMERICA

v.

MAIETTE, SALLY

Allen N. Brunwasser, Esquire and Sally Maiette,
Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNDER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by

Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and

to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

(s)

Judge

Dated: June 2, 1977

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1160

UNITED STATES OF AMERICA

v.

SALLY MAIETTE

MOTION TO DISMISS

Comes now the undersigned Assistant United States Attorney and moves this Honorable Court to dismiss the appeal in the above captioned matter for the following reasons:

1. On December 8, 1976, the Honorable Judge Barron P. McCune disqualified counsel Allen N. Brunwasser from representing Sally Maiette in the above captioned perjury matter because counsel represented George E. Lee as well as Maiette. Since George E. Lee was a principal in the grand jury investigation the court found representing potential witness Maiette was a conflict.

2. Since the Order was filed by Judge McCune and the notice of appeal by counsel for Maiette, George E. Lee

has now died as a result of gunshot wounds suffered on a downtown Pittsburgh street.

3. Because of Lee's death the rationale for Brunwasser being disqualified from representing Maiette is no longer present and thus the appeal is moot.

4. This Motion To Dismiss the appeal on the grounds that it is moot does not waive the right of the United States to come into the United States District Court for Western Pennsylvania and relitigate the issue of conflict of interest for reasons other than those presently raised in the hearing before Judge McCune.

Respectfully submitted,
Blair A. Griffith
United States Attorney
(s) Samuel J. Orr, III
By: Samuel J. Orr, III
Assistant U.S. Attorney

Date: April 7, 1977

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion To Dismiss was served by mail on Allen N. Brunwasser, Esquire, 903-B Grant Building, Pittsburgh, Pennsylvania 15219, on this 7th day of April, 1977.

(s) Samuel J. Orr, III
Samuel J. Orr, III
Assistant U.S. Attorney

EXHIBIT D

F 4/11/77
S 4/12/77

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1160

UNITED STATES OF AMERICA,
Appellee

vs.

SALLY MAIETTE and ALLEN N. BRUNWASSER,
Appellants

ANSWER TO MOTION TO DISMISS

To the Honorable, the Chief Judge and the Associate Judges of the United States Court of Appeals for the Third Circuit:

Sally Maiette and Allen N. Brunwasser, Esquire, respectfully answer the Motion To Dismiss as follows:

1. This allegation is admitted. However the Court is respectfully requested to examine the record to understand the full impact of the Order and the reasons given

plus examine the brief filed by Appellants in this Honorable Court.

2. It is admitted that George Lee was murdered. However, this murder was on February 24, 1977 as indicated by page 15 of the briefs filed in this Honorable Court by appellants.

3. It is denied that the death of Lee renders the matter moot for the following reasons:

(a) Lee died on February 24, 1977. This matter received wide attention in the media including the front page of the newspapers. The office of the United States Attorney was well-aware of what had occurred. In fact, two representatives of this office, Jeff Manning, Esquire and James Ruark, personally interested in the grand jury investigation of Lee, were presented in a search and seizure of his apartment in the Bigelow Apartments, Pittsburgh which search occurred February 25, 1977.

(b) Knowing this and realizing that Appellants were under an obligation to file a timely brief, the United States Attorney's office did absolutely nothing and the brief was filed timely on March 16, 1977 by mailing same to the Court of Appeals and hand delivery on the office of the U.S. Attorney. Thus, the office of the U.S. Attorney is estopped to now move the appeal be dismissed when it is under an obligation to file its brief no later than April 15, 1977.

(c) The grand jury investigation is continuing. The office of the U.S. Attorney is bringing in various people in order to investigate the murder of Lee. Therefore, the identical conflict which existed in re Maiette and

Brunwasser is likely to occur. It is capable of repetition, yet evading review.

What Appellants are saying is that the continuation of the grand jury investigation into the affairs of Lee will continue to raise the issue of conflict between Maiette, the targets of the grand jury investigation, the representation of Brunwasser of any potential witnesses when he represents Maiette. Therefore, the issue is not moot but is a continuing and live controversy.

(d) The issue of collection of the civil tax plus any possible fraud penalty will continue. Maiette has an excellent chance of being a witness in this civil proceeding and the issue of conflict will continue to exist.

(e) Other defendants represented by Allen N. Brunwasser, Esquire, will have this identical problem reoccur because it is apparent that the office of the U.S. Attorney in the Western District of Pennsylvania is determined to nullify the right of counsel to practice his profession. It is respectfully suggested that the Circuit should set the guidelines so that this matter will be resolved once and for all with efficiency. It is respectfully suggested that every District Court and every lawyer in the District has an interest in having this case adjudicated.

4. The Court is respectfully requested to observe that the caption of the case only includes Sally Maiette whereas Allen N. Brunwasser, Esquire, is also an Appellant. Since he has a property interest in the practice of law, *Mazzocone v. Willing,* decided November 22, 1976, allocatur granted by Supreme Court February15, 1977, Pa. Super. , 369 A.2d 829, 831, it is respectfully submitted that his right to an adjudication concerning

what he can or cannot do should be resolved on this appeal especially since it has been briefed and the brief of the U.S. Attorney is due no later than April 15, 1977.

5. The Court is respectfully requested to observe that paragraph 4 of the motion filed by Appellee reserves the right to "relitigate the issue of conflict of interest for reasons other than those presently raised in the hearing before Judge McCune". Thus, the issue is not resolved but will only continue. It is respectfully suggested that the purpose of the U.S. Attorney is to avoid filing a brief and having the issue resolved in the Court of Appeals and that if the issue is mooted and the case returned to the District Court the same issue will still be presented and be back in the Court of Appeals again.

6. It is respectfully suggested that the issue is one "capable of repetition, yet evading review", and therefore that it should be decided by this Honorable Court. *Gilligan v. Morgan,* 1973, 93 S.Ct. 2440, 2443, 413 U.S. 1, 5 (Court will not resolve case on mootness even though facts appear to justify it; case decided on merits); *Roe v. Wade,* 1973, 93 S.Ct. 705, 713, 410 U.S. 113, 125; *Pasadena City Board of Education v. Spangler,* 1976, 96 S.Ct. 2693, 2702, U.S. , (U.S. intervenes in school desegregation case, fact original student plaintiff graduates does not moot appeal); *Nebraska Press Association v. Stuart,* 1976, 96 S.Ct. 2791, 2797, U.S. , (court publicity restraining order expires; issue not moot because court can do it again).

Exhibit D

WHEREFORE, Appellants respectfully request that the motion be denied and the U.S. Attorney directed to file his brief on time.

Respectfully submitted,
(s) Allen N. Brunwasser
Allen N. Brunwasser
Attorney for Appellants

CERTIFICATION OF MAILING

I hereby certify that on the —— day of April, 1977 a true and correct copy of this Answer to Motion To Dismiss was mailed postage prepaid to Samuel J. Orr, III, Assistant U.S. Attorney, 633 U.S. Courthouse & Post Office Building, Pittsburgh, Pennsylvania 15219.

Exhibit E

EXHIBIT E

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Western District of Pennsylvania
633 U.S. Post Office & Courthouse
Pittsburgh, Pennsylvania 15219

Please Refer to
Initials and Number
SJO:mpk

April 14, 1977

Thomas F. Quinn, Clerk
United States Court of Appeals
for the Third Circuit

21400 United States Courthouse
601 Market Street
Independence Mall West
Philadelphia, PA 19106

Re: United States of America v. Sally Maiette
Appeal No. 77-1160

Dear Mr. Quinn:

In regards to the above captioned matter, this is to advise you that the government does not intend to file a brief answering Appellant Maiette's position. There are several reasons we are not doing so.

Exhibit E

At the time Judge McCune disqualified Allen N. Brunwasser from representing Sally Maiette at the same time he was representing George E. Lee, there was an active Internal Revenue Service criminal investigation open on Mr. Lee. Based on the facts before the court, Judge McCune found that a conflict of interest existed which disqualified Brunwasser from representing Maiette, who was a potential witness against George E. Lee. Since the time of Judge McCune's court order disqualifying Brunwasser, George E. Lee has been murdered and as a result is no longer the subject of a grand jury or Internal Revenue Service criminal investigation. For those reasons we believe that the appropriate action to be taken was a Motion To Dismiss the Appeal because it is moot, since the subject of the criminal investigation upon which Judge McCune based his order is now deceased.

Any other reasons which Judge McCune may have for disqualifying Brunwasser do not exist on the record which was before him. For that reason, we filed a Motion To Dismiss the Appeal as being moot rather than filing an answer to the appellant's brief arguing facts which no longer exist.

Very truly yours,
BLAIR A. GRIFFITH,
United States Attorney.
(s) SAMUEL J. ORR, III,
By: SAMUEL J. ORR, III,
Assistant U. S. Attorney.

cc: Allen N. Brunwasser, Esquire

Exhibit F

EXHIBIT F

April 18, 1977

Thomas F. Quinn, Clerk
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
601 Market Street
Independence Mall West
Philadelphia, PA 19106

Dear Dean Quinn:

I have read the April 14, 1977 communication of Mr. Orr concerning *U. S. v. Maiette,* Appeal No. 77-1160.

I have already filed a response to his motion to moot the appeal especially since he waited until I was required to fulfill my obligation to file a timely brief.

The order of Judge McCune goes beyond George E. Lee. It apparently will foreclose an attorney from representing one former client when another former client is involved. I believe it has far reaching impact and represents a policy of the Western District U. S. Attorney's Office.

I certainly hope the Court will not moot the appeal but will resolve the issue once and for all because I am certain it will be coming back again.

I would respectfully suggest that a far evaluation of the history of this case clearly indicates that Maiette

refused to frame Lee and that I might have been removed as a sanction to encourage her to do so.

The Lee murder has nothing to do with the posture of the case as it existed at the time the order was rendered and, in fact, as my reply to the quash motion indicates, the investigation is still continuing and the civil tax case with fraud penalties still exists and is a live controversy and issue.

Stated another way, the death of Lee has not changed the situation. The investigation is still continuing. People are being called into the grand jury. The civil tax aspect is still alive.

Additionally, we do not know what Judge McCune will do on remand and the case will probably be back in the Court again with the consequent expenditure of valuable time both by defense counsel and the Court of Appeals.

I think Mr. Orr should file a brief. I believe this is an important issue and concerns the Court and lawyers all over the district. In the event Mr. Orr is not required to file a brief, I suggest that Federal Rule of Appellate Procedure 31 (c) apply and he not be permitted to argue the case in the event oral argument is allowed.

Respectfully submitted,
ALLEN N. BRUNWASSER.

ANB:dc
cc: Samuel J. Orr, III, Esquire.

AFFIDAVIT

Commonwealth of Pennsylvania,
County of Allegheny, ss:

Personally appeared, SALLY MAIETTE and ALLEN N. BRUNWASSER, WHO, being duly sworn according to law, depose and say that the facts in the within petition are true and correct.

(s) SALLY MAIETTE
(s) ALLEN N. BRUNWASSER

Sworn to and subscribed before me this 20th day of June, 1977.

DIANE CLEMENTE,
Notary Public.
(Seal)

Pittsburg Allegheny, Pa.
My Commission expires April 24, 1978